our various schools. . . . It has been a really serious evil (speaking merely as a scientific student of history) to find teachers suppressing, as far as possible, all mention of wars in the history they have taught their pupils; teaching their classes that wars never determine anything and are without real significance; that their heroisms, etc., are overestimated, and the like. . . . I know a man who stands pretty high in the educational world who talks privately (and I think by implication in his class-room) that Washington and Lincoln are overestimated men because they could not avoid fighting. I have been personally advised by a really prominent publisher that I had better "cut out the references to battles (in a school history I was issuing) just as far as I could if I wished a great many schools to adopt it." . . . The evil is a real one. . . . In making up its program for the future work I hope the Navy League will include this question of *efficient education in patriotism* near the top of its list.

This intimation that patriotic instinct must have war and battle for its food is most excellent humor. Such as this lightens the reader on his weary way. We have felt before that *Sea Power* should be congratulated on these spicy, light-hearted thoughts that it utters from time to time, and take this occasion publicly to do so.

THE ORGANIZATION OF INTERNATIONAL JUSTICE*

By JAMES BROWN SCOTT

SOME people, indeed many people, will consider a word in behalf of the peaceful settlement of international disputes as out of place during war. Yet a word in behalf of peaceable settlement during war is more needed than in times of peace, and a failure during war to express belief in peaceful settlement is a confession of hopelessness and defeat. It is especially during war, when the brutality and uselessness of mere physical force in the settlement of international disputes is most evident, that the partisans of peaceful settlement should not only raise their voices, but should confer together—in a multitude of counselors there is safety—in order to devise some scheme, if possible, whereby wars which may not be prevented may at least be made of less frequent occurrence. It is at the end of war, when victor and victim have suffered in their persons and property, that they are most likely to listen to the still, small voice of reason unheard or unheeded in the din of arms.

Thus, Grotius, writing in 1625 during the horrors of the Thirty Years' War, confessed his faith in a law governing the conduct of belligerents, and the principles which he gave to the world during this war made their way after it into the practice of nations.

And thus, after the horrors of the wars of the French Revolution and of the Empire, victors and victim formed themselves into a league of nations to maintain and to enforce peace, which failed because physical force cannot be, at least never has been, safely entrusted to nations to be used against their fellow-members of the society of nations. That is to say, the wars of the Revolution and of the Empire had created a desire for peace and its maintenance, and the Holy Alliance (for this is the name of that league of nations) is worthy of consideration, although we must regard the work of its hands as faulty.[1]

The great war of 1914, which is slowly running its course, will one day end, and, just as in times past nations have met in conference at the conclusion of war, so they will again meet in conference at the conclusion of the war of 1914. Because of this, it seems to be of more than passing interest for the friends of peace to confer one with another, to devise a plan more modest, it may be, than many would like, but perhaps, for that very reason, more possible of attainment; and to endeavor to secure the acceptance of this plan in the hope that the peace which is soon to be declared, for it cannot be much longer delayed, will be less readily broken in the future than in the past.

I would therefore venture to suggest concentration upon a very few points such as the following, in order to reach clear, definite, and acceptable conclusions upon them:

I.

To urge the call of a Third Hague Conference to which every country belonging to the society of nations shall be invited and in whose proceedings every such country shall participate.

If it be true, as the Gospel assures us, that in a multitude of counselors there is safety and, as we may hope, wisdom, it necessarily follows that the larger the number of the nations met in conference the greater the safety and the greater the wisdom. Indeed, there are those, whose opinions are entitled to respect, who see in the meeting of the Hague Conferences a greater hope and a greater promise than in the work of their hands. The Hague Conference of 1899 was composed of the representatives of twenty-six States; its successor of 1907 represented officially no less than forty-four sovereign, free, and independent States, which, taken together, well nigh make up the society of civilized nations.

II.

To advocate a stated meeting of the Hague Peace Conference which, thus meeting at regular, stated periods, will become a recommending if not a law-making body.

Without a radical reorganization of the society of nations, difficult, time-consuming, and perhaps impossible to bring about, the Conventions and Declarations adopted by the Conference are to be considered not as international statutes, but as recommendations, which must be submitted to the nations taking part in the Conference for their careful examination and approval. By the ratification of each of these, and by the deposit of

* An address, as revised and enlarged, delivered before the Conference of Peace Workers, New York City, Oct. 26, 1916.

(1) Phillips' Confederation of Europe: A Study of the European Alliance, 1813-1823, as an Experiment in the International Organization of Peace (1914).

the ratifications at The Hague in accordance with the terms of the Conventions and Declarations recommended by the Conference, they become at one and the same time national and international laws: national laws because they have been ratified by the law-making body of each of the countries, and international laws because, by the ratification and the deposit of the ratifications at The Hague, they have assumed the form and effect of treaties, that is to say statutes, of the contracting parties.

III.

To suggest an agreement of the States forming the society of nations concerning the call and procedure of the Conference, by which that institution shall become not only internationalized, but in which no nation shall take as of right a preponderating part.

The American delegation to the Second Hague Peace Conference was thus instructed by the great and wise statesman, then Secretary of State:

"you will favor the adoption of a resolution by the Conference providing for the holding of further Conferences within fixed periods and arranging the machinery by which such Conferences may be called and the terms of the program may be arranged, without awaiting any new and specific initiative on the part of the Powers or any one of them." [2]

Mr. Root then went on to say:

"Encouragement for such a course is to be found in the successful working of a similar arrangement for international conferences of the American republics. The Second American Conference, held in Mexico in 1901-2, adopted a resolution providing that a third conference should meet within five years, and committed the time and place and the program and necessary details to the Department of State and representatives of the American States in Washington. Under this authority the Third Conference was called and held in Rio de Janeiro in the summer of 1906, and accomplished results of substantial value. That Conference adopted the following resolution:

" 'The governing board of the International Bureau of American Republics (composed of the same official representatives in Washington) is authorized to designate the place at which the Fourth International Conference shall meet, which meeting shall be within the next five years; to provide for the drafting of the program and regulations and to take into consideration all other necessary details; and to set another date in case the meeting of the said Conference cannot take place within the prescribed limit of time.'

"There is no apparent reason to doubt that a similar arrangement for successive general international conferences of all the civilized Powers would prove as practicable and as useful as in the case of the twenty-one American States." [3]

The American delegation complied with both the letter and spirit of these instructions, brought the subject of a stated international conference to the attention of the delegates of the forty-four nations there assembled, and secured the following recommendation, a first step toward the realization of a larger purpose:

"Finally, the Conference recommends to the Powers the assembly of a Third Peace Conference, which might be held within a period corresponding to that which has elapsed since the preceding Conference, at a date to be fixed by common agreement between the Powers, and it calls their attention to the necessity of preparing the program of this Third Conference a sufficient time in advance to ensure its deliberations being conducted with the necessary authority and expedition.

"In order to attain this object the Conference considers that it would be very desirable that, some two years before the probable date of the meeting, a preparatory committee should be charged by the Governments with the task of collecting the various proposals to be submitted to the Conference, of ascertaining what subjects are ripe for embodiment in an international regulation, and of preparing a program which the Governments should decide upon in sufficient time to enable it to be carefully examined by the countries interested. This committee should further be intrusted with the task of proposing a system of organization and procedure for the Conference itself." [4]

IV.

To request the appointment of a committee, to meet at regular intervals between the Conferences, charged with the duty of procuring the ratification of the Conventions and Declarations and of calling attention to the Conventions and Declarations in order to ensure their observance.

In Mr. Root's instructions to the American delegation to the Second Hague Peace Conference, the governing board of the International Bureau of American Republics, now called the Pan American Union, was suggested as a possible method of organization for the nations meeting in conference at The Hague. The American delegation did not lay before the Conference the method of organization found satisfactory to the American Republics and did not propose that it be adopted, because, as the result of private discussion, it appeared unlikely that the method would at that time meet with favor, and indeed it seemed probable that its proposal would prejudice those representatives of governments against the periodic meeting of conferences who thought they saw in co-operation of this kind a step toward federation.

There is, however, a body already in existence at The Hague, similar in all respects to the governing board of the Pan American Union at Washington, which can be used for like purposes if the governments only become conscious of the existence of this body and of the services which it could render if it were organized and invested with certain powers. The body at Washington forming the governing board is composed of the diplomatic representatives of the American Republics accredited to the United States; the body at The Hague is formed of the diplomatic representatives of the powers accredited to the Netherlands.

[2] Foreign Relations of the United States, 1907, pt. 2, p. 1130; Instructions to the American Delegates to the Hague Peace Conferences and Their Official Reports, New York, Oxford University Press, 1916, p. 72.

[3] Foreign Relations, 1907, pt. 2, pp. 1130-1131; Instructions to the American Delegates, pp. 72-73.

[4] Foreign Relations, 1907, pt. 2, p. 1277; The Hague Conventions and Declarations, New York, 1915, Oxford University Press, pp. 29-30.

If they were invited by His Excellency, the Minister of Foreign Affairs of the Netherlands, to meet in conference in the Foreign Office at The Hague, they would naturally meet under his chairmanship, just as the American diplomats meeting in Washington find themselves under the chairmanship of the Secretary of State of the United States. If the Dutch Minister of Foreign Affairs would suggest to them in conference that they should be authorized by their respective governments to meet, either in the Foreign Office or the Peace Palace at The Hague at regular intervals between the conferences, to be determined by themselves or their countries, they would, by the mere fact of this association, form a governing board in which all nations would of right be represented which cared to maintain diplomatic agents at The Hague. By the mere fact of this association they would also, even without express authority, gradually and insensibly assume the duty of procuring the ratification of the Conventions and Declarations of the Conference and of calling the attention of the powers represented at The Hague to the Conventions and Declarations, and in case of need to their provisions, in order that they might be observed.

It is only necessary for the nations to confess in public what they admit in private, that the interest of all is superior to the interest of any one, and that the general interest can best be promoted by the action of all met together for that purpose, instead of limited groups working often at cross purposes.

The first step toward this consummation devoutly to be wished has already been taken. Twenty-six nations at the First and forty-four nations at the Second Hague Peace Conference recognized in the preamble to the Convention for the Pacific Settlement of International Disputs "the solidarity which unites the members of the society of civilized nations." They considered it expedient to extend "the empire of law" and to strengthen "the appreciation of international justice" and "to record in an international agreement the principles of equity and right on which are based the security of States and the welfare of peoples." They therefore created the so-called Permanent Court of Arbitration, "accessible to all" and "in the midst of the independent Powers," to extend the empire of law and to strengthen the appreciation of international justice, upon which the security of States and the welfare of peoples are based.

They thus recognized in the First and solemnly confirmed in the Second Conference the universal need of principles of equity and right to all nations, and, recognizing this need, they created an organization by availing themselves of the diplomatic agents accredited to The Hague to give effect to the principles of law and equity upon which their security as States and the welfare of their peoples depended. Thus the twenty-six nations said in 1899, and thus the forty-four nations restated it in 1907, in the Convention for the Pacific Settlement of International Disputes:

"A Permanent Administrative Council, composed of the diplomatic representatives of the signatory Powers accredited to The Hague and of the Netherland Minister for Foreign Affairs, who will act as president, shall be instituted in this town as soon as possible after the ratification of the present Act by at least nine Powers.

"This Council will be charged with the establishment and organization of the International Bureau [of the Permanent Court of Arbitration], which will be under its direction and control.

"It will notify to the Powers the constitution of the Court, and will provide for its installation.

"It will settle its rules of procedure and all other necessary regulations.

"It will decide all questions of administration which may arise with regard to the operations of the Court.

"It will have entire control over the appointment, suspension, or dismissal of the officials and employés of the Bureau.

"It will fix the payments and salaries, and control the general expenditure.

"At meetings duly summoned the presence of five members is sufficient to render valid the discussions of the Council. The decisions are taken by a majority of votes.

"The Council communicates to the signatory Powers without delay the regulations adopted by it. It furnishes them with an annual report on the labors of the Court, the working of the administration, and the expenses." [5]

What has been done for one may assuredly be done for another purpose, and, without changing the body, the nations merely need to enlarge its scope by having it perform the same services for each of the general interests affecting "the solidarity which unites the members of the society of civilized nations." If a governing board may act at Washington without affecting the sovereignty, freedom, and independence of twenty-one States, a governing board can likewise act at The Hague in the interest of and without affecting the sovereignty, freedom, and independence of forty-four States. There is only one thing needed—the desire so to do.

In the belief that the powers may prefer to proceed more cautiously, I have presumed to suggest on this point that the Conference might, upon its adjournment, appoint a committee charged with the duty of procuring the ratification of the Conventions and Declarations, and of calling attention to the Conventions and Declarations in order to secure their observance; and in the appointment of the committee the Conference might specify both the nature and extent of the authority with which it would be clothed. This would not be an attempt on the part of a Conference to bind its successor; it would be a recommendation of the Conference to the powers represented in it, the binding force and effect of which would result solely from the acceptance and ratification of the agreement, as is the case with the Hague Conventions or Declarations.

The appointment of such a committee for limited and specific purposes is highly desirable, if other and better methods are not devised and preferred, and it is not without a precedent in its behalf and favor. Under the 9th of the Articles of Confederation the Congress appointed "a committee of the States," composed of one delegate from each of the thirteen States, to sit during the recess of the Congress, then a diplomatic, not a parliamentary body, to look after the interests of the States as a whole and to exercise some, but not all, of the powers delegated to the Congress by the States, which in the 2d of the Articles had declared themselves to be

[5] Foreign Relations, 1899, p. 526; Hague Conventions, pp. 62-63.

sovereign, free, and independent. It is important to note that in the Articles of Confederation we are dealing with Sovereign States and to bear in mind that Sovereignty is not lessened by its mere exercise, because after as before the Articles the States were sovereign. What thirteen sovereign, free, and independent States have done, forty-four sovereign, free and independent States may do, if they only can be made to feel and to see the consequences of this simple step in international development and supervision.

If the Conference in its wisdom should accept Mr. Root's proposal, it could utilize for this purpose the governing board already in existence, namely, the administrative council of the so-called Permanent Court of Arbitration at the Hague, or, if it should prefer a smaller committee, it could designate the members subject to the approval of the powers represented in the Conference; or it might make even a more modest, and indeed the most modest, recommendation to accomplish the same result, namely, the suggestion that the diplomatic agents of the powers accredited at the Hague should form from their number an executive committee, charged with the duties of an international committee between the Conferences, to report to the diplomatic corps at regular intervals, so that all countries believing and taking part in the Hague Conferences would be promptly informed of the action taken by their duly accredited representatives.

Let me quote in this connection the following paragraph from a work on the Hague Conferences, in which I ventured to point out the advantage of a committee between the Conferences, the nature of the committee, and the services which it could render to the Society of Nations:

"It may well be that the preparatory committee mentioned by the recommendation for a Third Conference, 'charged by the Governments with the task of collecting the various proposals to be submitted to the Conference, of ascertaining what subjects are ripe for embodiment in an international regulation,' will develop into a standing committee entrusted with international interests between the various conferences. Especially would this be so if the committee were appointed by the Conference, instead of being selected by agreement of the Powers some time before the calling of the future Conference. It would not be an executive; it would not be a Government; it would, however, as a committee, represent international interests during the periods between the Conferences." [6]

V.

To recommend an understanding upon certain fundamental principles of international law, as set forth in the Declaration of the Rights and Duties of Nations adopted by the American Institute of International Law on January 6, 1916, which are themselves based upon decisions of English courts and of the Supreme Court of the United States.

"1. Every nation has the right to exist and to protect and to conserve its existence; but this right neither implies the right nor justifies the act of the State to protect itself or to conserve its existence by the commission of unlawful acts against innocent and unoffending States. (Chinese Exclusion Case, 130 U. S., 581, 606; Regina *vs.* Dudley, 15 Cox's Criminal Cases, p. 624, 14 Queen's Bench Division, 273.)

"2. Every nation has the right to independence in the sense that, it has a right to the pursuit of happiness and is free to develop itself without interference or control from other States, provided that in so doing it does not interfere with or violate the rights of other States.

"3. Every nation is in law and before law the equal of every other nation belonging to the society of nations, and all nations have the right to claim and, according to the Declaration of Independence of the United States, 'to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them.' (The Louis, 2 Dodson 210, 243-44; The Antelope, 10 Wheaton, 66, 122.)

"4. Every nation has the right to territory within defined boundaries and to exercise exclusive jurisdiction over its territory, and all persons, whether native or foreign, found therein. (The Exchange, 7 Cranch, 116, 136-7.)

"5. Every nation entitled to a right by the law of nations is entitled to have that right respected and protected by all other nations, for right and duty are correlative, and the right of one is the duty of all to observe. (United States *vs.* Arjona, 120 U. S., 479, 487.)

"6. International law is at one and the same time both national and international: national in the sense that it is the law of the land and applicable as such to the decision of all questions involving its principles; international in the sense that it is the law of the society of nations, and applicable as such to all questions between and among the members of the society of nations involving its principles." (Buvot *vs.* Barbuit, Cases Tempore Talbot, p. 281; Triquet *vs.* Bath, 3 Burrow, p. 1478; Heathfield *vs.* Chilton, 4 Burrow, 2015; The Paquete Habana, 175 U. S., 677, 700.)[7]

VI.

To propose the creation of an international council of conciliation, to consider, to discuss, and to report upon such questions of a non-justiciable character as may be submitted to such council by an agreement of the powers for this purpose.

The prototype of this council is the International Commission of Inquiry proposed by the First Hague Conference, and contained in its Convention for the Pacific Settlement of International Disputes. Its form may well be that adopted by Mr. Bryan in the various treaties for the advancement of peace which, as Secretary of State, he concluded on behalf of the United States with many foreign nations. In these it is provided that all disputes which diplomacy has failed to settle, or which have not been adjusted by existing treaties of arbitration, shall be laid before a permanent commission of some five members, which shall have a year

[6] The Hague Peace Conferences of 1899 and 1907, vol. 1, p. 751.

[7] For preamble and official commentary on this declaration, send to American Peace Society, Washington, D. C.

within which to report its conclusions and during which time the contracting parties agree not to resort to arms.

The powers might agree to establish an international commission as it is proposed to establish an international court, to be composed of a limited number of members appointed for a period of years, to which perhaps a representative of each of the countries in controversy might be added, in order that the views of the respective governments should be made known and be carefully considered by those members of the commission strangers to the dispute. In this case there would be a permanent nucleus, and the powers at odds would not be obliged to agree upon the members of the commission, but only to appoint, each for itself, a national member. In this way the dispute could be submitted to the commission before it had become acute and had embittered the relations of the countries in question.

If an international commission of the kind specified should be considered too great a step to be taken at once, the countries might conclude agreements modelled upon those of Mr. Bryan, and as the result of experience take such action in the future as should seem possible and expedient.

The conclusions of the commission are in the nature of a recommendation to the powers in controversy, which they are free either to accept or to reject. They are not in themselves an adjustment as in the case of diplomacy, an award as in the case of arbitration, or a judgment as in the case of a court of justice. It is the hope of the partisans of this institution that its conclusions will nevertheless form the basis of settlement and that, under the pressure of enlightened public opinion, the powers may be minded to settle their differences more or less in accord with the recommendations of the commission.

VII.

To commend the employment of good offices, mediation, and friendly composition for the settlement of disputes of a non-justiciable nature.

Good offices and mediation were raised to the dignity of an international institution by the First Hague Peace Conference, and in its Peaceful Settlement Convention the signatory or contracting powers agreed to have "recourse, as far as circumstances allow, to the good offices or mediation to the countries at variance, and it is specifically stated in the Convention, in order to remove doubt or uncertainty, that the offer of good offices or of mediation is not to be considered as an unfriendly act—and the powers might also have added that it is not an act of intervention, which nations resent.

The offer of good offices is a word of advice, it is not an award or a decision. Mediation goes a step further, as the nation proposing it offers to co-operate with the parties in effecting a settlement. The agreement to ask and to offer good offices and mediation is qualified by the expression "as far as circumstances will allow." It is therefore highly desirable that frequent resort be made to good offices and mediation, in order that the nations may learn from experience that circumstances allow the offer and the acceptance of good offices and mediation without danger to either and with satisfaction to both.

Friendly composition is more than good offices or mediation, and may be less than arbitration. It is not limited to advice, and it is not restricted to co-operation; it is the settlement of a difference not necessarily upon the basis of law, but rather according to the judgment of a high-minded and conscientious person possessing in advance the confidence of both parties to the dispute and deserving it by his adjustment of the dispute. It may be a settlement in the nature of a compromise; it may be an adjustment according to the principles of fair dealing; it may be a bargain according to the principles of give and take. This remedy has been found useful in the past, and it can be of service in the future, where it is more to the advantage of nations to have a dispute adjusted than to have it determined in any particular way.

VIII.

To approve the principle of arbitration in the settlement of disputes of a non-justiciable nature; also of disputes of a justiciable nature which should be decided by a court of justice, but which have, through delay or mismanagement, assumed such political importance that the nations prefer to submit them to arbiters of their own choice rather than to judges of a permanent judicial tribunal.

The arbiter is not, as is the friendly composer, a free agent in the sense that he may render an award in accordance with his individual sense of right or wrong, for, as the First Hague Peace Conference said in its Pacific Settlement Convention, "international arbitration has for its object the settlement of differences between States by judges of their own choice, and on the basis of respect for law." Even if law is not absolutely binding it cannot be arbitrarily rejected; it must be respected, and the sentence, if it be not just in the sense that it is based upon law, it must be equitable in the sense that it is based upon the spirit of the law as distinct from the letter.

Hundreds of disputes have been settled since the Jay Treaty of 1794 between Great Britain and the United States, which brought again this method into repute and into the practice of nations. As a result of this large experience, extending over a century, nations find it difficult to refuse arbitration when it has been proposed. But if it is a sure, it is a slow-footed, remedy, as in the absence of a treaty of arbitration one must be concluded, and, in the practice of the United States, there must be a special agreement submitted to and advised and consented to by the Senate, stating the exact nature and scope of the arbitration. The arbiters forming the temporary tribunal must likewise be chosen by the parties, and unfortunately at a time when they are least inclined to do so. It is a great and a beneficent remedy, but the difficulty of setting it in motion and the doubt that the award may be controlled by law suggest the creation of a permanent tribunal which does not need to be composed for the settlement of the case and in which law shall, as in a court of justice, control the decision.

There are many cases turning on a point of law and which could be got out of the way, to the great benefit of the cause of international peace, if they were submitted, when and as they arose, to a judicial tribunal. Unfortunately, such a tribunal has not existed in times past, and many a dispute, by delay or mismanagement,

has assumed a political importance which it did not possess at the beginning. Nations may have taken a position upon it, and in consequence be unwilling to change their attitude. Again, there are matters, largely if not wholly political, or in which the political element dominates, which nations would prefer to submit to a limited commission or tribunal composed of persons in whose ability and character they have confidence and whose training seems to fit them for the disposition of the controversy in hand.

The reasons for a resort to arbitration, even although an International Court of Justice be established and ready to receive and to decide the case, have never been better put than by Mr. Léon Bourgeois in advocating the retention of the so-called Permanent Court of Arbitration and of creating alongside of it a permanent court composed of professional judges, which was proposed at the second Hague Conference of 1907 and adopted in principle:

"If there are not at present judges at The Hague, it is because the Conference of 1899, taking into consideration the whole field open to arbitration, intended to leave to the parties the duty of choosing their judges, which choice is essential in all cases of peculiar gravity. We should not like to see the court created in 1899 lose its essentially arbitral character, and we intend to preserve this freedom in the choice of judges in all cases where no other rule is provided.

"In controversies of a political nature especially, we think that this will always be the real rule of arbitration, and that no nation, large or small, will consent to go before a court of arbitration unless it takes an active part in the appointment of the members composing it.

"But is the case the same in questions of a purely legal nature? Can the same uneasiness and distrust appear here? . . . And does not every one realize that a real court composed of real jurists may be considered as the most competent organ for deciding controversies of this character and for rendering decisions on pure questions of law?

"In our opinion, therefore, either the old system of 1899 or the new system of a truly permanent court may be preferred, according to the nature of the case. At all events there is no intention whatever of making the new system compulsory. The choice between the tribunal of 1899 and the court of 1907 will be optional, and the experience will show the advantages or disadvantages of the two systems." [8]

IX.

To insist upon the negotiation of a convention creating a judicial union of the nations along the lines of the Universal Postal Union of 1908, to which all civilized nations and self-governing dominions are parties, pledging the good faith of the contracting parties to submit their justiciable disputes, that is to say, their differences involving law or equity, to a permanent court of this union, whose decisions will bind not only the litigating nations, but also all parties to its creation.

The prototype of this international court of justice and its procedure is the Supreme Court of the United States and its procedure, which may be thus briefly outlined:

1. The Supreme Court determines for itself the question of jurisdiction, receiving the case if it finds that States are parties and if, as presented, it involves questions of law or of equity. (Rhode Island *vs.* Massachusetts, 12 Peters, 655, decided by Mr. Justice Baldwin.)

2. If States are parties to the suit, and if it is justiciable, that is, if it involves law or equity, the plaintiff State is, upon its request, entitled to have a subpœna against the defendant State issued by the Supreme Court. (New Jersey *vs.* New York, 3 Peters, 461, decided by Mr. Chief Justice Marshall; New Jersey *vs.* New York, 5 Peters, 284, decided by Mr. Chief Justice Marshall.)

3. The plaintiff State has the right to proceed *ex parte* if the defendant State does not appear and litigate the case. (New Jersey *vs.* New York, 5 Peters, 284, decided by Mr. Chief Justice Marshall; Massachusetts *vs.* Rhode Island, 12 Peters, 755, decided by Mr. Justice Thompson.)

4. The plaintiff State has the right, in the absence of the defendant duly summoned and against which a subpœna has been issued, to proceed to judgment against the defendant State in a suit which the Supreme Court has held to be between States and to be of a justiciable nature. (New Jersey *vs.* New York, 5 Peters, 284, decided by Mr. Chief Justice Marshall.)

5. In the exercise of its jurisdiction the Supreme Court does not compel the presence of the defendant State (Massachusetts *vs.* Rhode Island, 12 Peters, 755, decided by Mr. Justice Thompson), nor does it execute by force its judgment against a defendant State (Kentucky *vs.* Dennison, 24 Howard, 66, decided by Mr. Chief Justice Taney).

The reasonableness of the judgment and the advantage of judicial settlement have created a public opinion as the sanction of the Supreme Court in suits between States.

6. In the exercise of its jurisdiction the Supreme Court has moulded a system based upon equity procedure between individuals in such a way as to simplify it, giving to the defendant State opportunity to present its defense as well as to present its case without delaying or blocking the course of justice by technical objections. (Rhode Island *vs.* Massachusetts, 14 Peters, 210, decided by Mr. Chief Justice Taney.)

In the Universal Postal Union, which has been mentioned as the prototype of a judicial union, all the civilized nations of the world and self-governing dominions have bound themselves to submit to arbitration their disputes concerning the interpretation of the Convention as well as their disputes arising under it, by a commission of three arbiters, of whom one is to be appointed by each of the disputants and the third in case of need by the arbiters themselves. What the nations have agreed to do *after* they can do *before* the outbreak of a dispute, for the appointment in this case is a matter of time, not of principle. Should they create a judicial union, and at the time of its formation install a permanent tribunal composed of a limited number of judges, the society of nations would find itself possessed of a court of justice composed in advance of the disputes, ready to assume jurisdiction of them whenever they should arise, without the necessity of creating the court, appointing its members, agreeing upon the question to be litigated, and in many, if not in most, instances upon the procedure to be followed. As in the case of the Supreme Court, which has been sug-

[8] The Reports to the Hague Conferences, Oxford, 1916, Clarendon Press, p. 233.

gested as the prototype of an international tribunal, there would be no need of a treaty of arbitration or of a special agreement in addition to the Convention creating the court and authorizing it to receive and decide justiciable disputes submitted by the contracting parties. The plaintiff State could set the court in motion upon its own initiative, without calling to its aid the members of the Union, just as each member of the American Union can file its bill in the Supreme Court without the aid, and indeed without the knowledge, of the other States of the American judicial union.

I would especially dwell upon the fact that sovereignty is not necessarily involved in the formation of a judicial union, in the appointment of the judges, or in the operation of the judicial tribunal, because in the Universal Postal Union self-governing dominions are parties, which could not be the case if sovereignty were requisite as they are not, although they may one day be sovereign. The experience of the Supreme Court of the United States shows that justice and its administration are the bulwarks of the States against aggression from without as well as from within.

I have not mentioned the question of physical force, either to hale a nation into court or to execute against it the judgment of the international tribunal. The sheriff did not antedate the judge, nor did he come into being at the same time. He is a later creation, if not an afterthought. He is necessary in disputes between individuals; he is not necessary—at least, he is not a part of the machinery of the Supreme Court in the trial of disputes between States of the American judicial union and in the execution of its judgments against States. It may be that an international sheriff may prove to be necessary, but nations shy at physical force, especially if they understand that it is to be used against them. The presence of the sheriff armed with force, that is to say, of an international police, would make an agreement upon an international court more difficult, and if an international sheriff should prove to be unnecessary his requirement as a prerequisite to the court would delay the constitution of this much-needed institution.

If the sheriff is needed, or if some form of compulsion is found advisable in order to procure the presence of the defendant State before the international tribunal, and to execute the judgment thereof when rendered, it is, as it seems to me, the part of wisdom to allow the experience of nations to determine when and how the force shall be created and under what circumstances and conditions it is to be applied. If we unduly complicate the problem by insisting that the international court shall be, in its beginning, more perfect than is the Supreme Court of the United States after a century and more of successful operation, we run the risk of sacrificing the bone to the shadow, to use the very familiar illustration as old as Æsop, whose day as a prophet is not yet run.

The advocates of an International Court have for the most part laid undue and unbecoming stress, as it seems to me, upon the appearance before the court of the defendant State and upon the execution of the judgment of the court, which they would have us think can only be reached and rendered in the presence and with the co-operation of the defendant.

Perhaps the clearest and fullest statement of this view which, if not the earliest in point of time, is assuredly the most altruistic in conception, the most balanced in detail, and the most thorough in operation, and as superior to its meagre predecessors and to its numerous progeny as its author was and is to the generality of mankind, is to be found in Penn's Essay toward the Present and Future Peace of Europe. In this project, published as long ago as 1693, the good Quaker advocated a diet or parliament to meet annually, or every second or third year, in which the sovereign princes of Europe were to be represented in proportion to their property, and "before which sovereign assembly, should be brought all differences depending between one sovereign and another, that cannot be made up by private embassies, before the sessions begin." The assembly is thus, as Penn properly says, sovereign, and it was to decide as a sovereign differences between and among the sovereign princes of Europe who, in the language of the present day, would be called the contracting parties. As sovereign the assembly was to hale before it the parties in controversy and to adjudge the dispute; if they refused to submit the difference, or delayed to do so beyond the day fixed by the assembly, the submission was to be enforced by the mailed fist; or if they submitted the difference, but failed to comply with the judgment of the assembly, the signatory sovereigns were to secure compliance by physical force.

If, notwithstanding the agreement to abide by the judgment of the assembly, the disputants preferred to "seek their remedy by arms," the other sovereign princes making common cause against the peace breakers, were to bring them to reason by physical force.

But to quote Penn, instead of paraphrasing his language:

"If any of the Sovereignties that constitute these imperial States, shall refuse to submit their claim or pretensions to them, or to abide and perform the judgment thereof, and seek their remedy by arms, or delay their compliance beyond the time prefixed in their resolutions, all the other Sovereignties, united as one strength, shall compel the submission and performance of the sentence, with damages to the suffering party, and charges to the Sovereignties that obligated their submission."

Two centuries and more have passed since the publication of Penn's Essay, and the plan is still a project. In the meantime the founders of the American Republic have approached the problem of International Justice and its administration from the standpoint of the possible, and have realized in practice the ideal of the high-minded and generous theorist. The statesmen of the American Revolution knew that their States would not agree to the use of physical force against themselves, even if they should propose it. They had seen negotiations fail, and between the breakdown of diplomacy on the one hand and the resort to arms on the other, these same statesmen inserted the resort to a court of justice for the trial of justiciable disputes between their States. They created a Supreme Court for the thirteen States and such others as should be added to the judicial union, and invested it with the jurisdiction of all cases in law or equity between the States, which considered themselves as sovereign for the purposes of justice. They felt that, if there were an agency at hand and of their

own creation to pass upon the question of right and wrong, justice would in the end prevail, whether the defendant State appeared to litigate the case, or whether the judgment rendered in its presence or absence were executed by the losing State. They appreciated rightly the influence of public opinion, they recognized that public opinion often succeeds where force would fail, and the appeal to "a decent respect to the opinions of mankind," proclaimed in their Declaration of Independence, has not been in vain.

The founders of the Republic and the Fathers of the Constitution knew also that everybody's business is nobody's concern, and instead of pledging the States "united as one strength," to use the language of Penn, to proceed against a non-appearing defendant State, they authorized and empowered the State with a grievance sounding in law or in equity to file its bill in the Supreme Court against the defendant State, and in its absence, if it failed to appear, to proceed to trial. The case was thus brought to judgment notwithstanding the default of the defendant. Force is thus not needed to obtain a judgment based upon justice, and the experience of the Supreme Court in three score suits and more between the States shows that compliance with a judgment based upon justice follows without a resort to force. Nay more, the Government of the United States, "united as one strength," does not consider itself above justice; it has filed its bill in the Supreme Court against a State of the judicial Union, and it has both sought and obtained justice at the hands of the Supreme Court against a State of the Union, which was once in all respects and considers itself for the purposes of justice still to be a sovereign State. In this interesting case, the United States claimed ownership of a portion of territory likewise claimed by Texas, and which figured as Greer county on maps of that State. Availing itself of the clause of the Constitution extending the judicial power "to controversies between two or more States," and vesting the Supreme Court with original jurisdiction "in all cases * * * in which a State shall be a party," the United States filed its bill asking "a decree determining the true line between the United States and the State of Texas;" asking "whether the land constituting what is called 'Greer County,' is within the boundary and jurisdiction of the United States or of the State of Texas"; and asking finally that "its rights, as asserted in the bill, be established, and that it have such other relief as the nature of the case may require" (United States *vs.* Texas, 1891, 143 U. S. Reports, 621).

The framers of the Articles of Confederation gave the Congress the power to fix the quotas of revenue needed for general purposes; the individual States failed to honor the requisitions, and the Confederacy was on the verge of bankruptcy. In the Constitutional Convention of 1787, called to amend the Articles of Confederation and to make them adequate to the needs of the States, it was proposed to grant the general Government the right and the power to coerce the States in such cases. The proposal was indignantly rejected, but by a very simple device, the end was attained by peaceable means. The general Government was given the right to levy the tax on the people and to collect it, if necessary, by suit in court without a resort to the State or its good offices with the citizen. In like manner, without the power of coercion, justice is done between the plaintiff and defendant State by authorizing the plaintiff State to set the Supreme Court in motion without the aid of the other States, indeed, as I have said, without their knowledge, and a judgment is rendered in due course in the presence or absence of the defendant State.

In the plan of the Virginia delegation, laid before the Constitutional Convention by Edmund Randolph of Virginia on May 29th, the last clause of the sixth resolution authorized the national legislature "to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof," [9] a proposition likewise contained in the New Jersey plan, introduced on June 15th by William Patterson of New Jersey, authorizing the Federal Executive "to call forth ye power of the Confederated States, or so much thereof as may be necessary to enforce and compel an obedience to such acts, or an observence of such treaties." [10]

A very little experience of the temper of the Convention convinced Madison of the impracticability of this provision, author though he was of the Virginian plan, so that on May 31st, but two days after the introduction of the resolutions, he changed his mind, as appears from the following extract from the debates:

"The last clause of Resolution 6 authorizing the exertion of the force of the whole agst. a delinquent State came next into consideration.

"Mr. Madison observed that the more he reflected on the use of force, the more he doubted the practicability, the justice and efficacy of it when applied to people collectively and not individually,—a Union of the States containing such an ingredient seemed to provide for its own destruction. The use of force agst. a State, would look more like a declaration of war, than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound. He hoped that such a system would be framed as might render this recourse unnecessary, and moved that the clause be postponed." [11]

Mr. Madison informs us that "this motion was agreed to nem. con." It does not figure in the Constitution for the reasons disclosed and set forth in the debates.

A few days later, to be specific, on June 8th, Mr. Madison recurred to the subject and confirmed his recantation of the use of force against a State. Thus:

"Could the national resources, if exerted to the utmost enforce a national decree agst. Massts. abetted perhaps by several of her neighbours? It wd. not be possible. A small proportion of the Community in a compact situation, acting on the defensive, and at one of its extremities might at any time bid defiance to the National authority. Any Govt. for the U. States formed on the supposed practicability of using force agst. the unconstitutional proceedings of the States, wd. prove as visionary and fallacious as the Govt. of Congs." [12]

The views thus expressed by Madison survived the Convention in which they were formed and stated, as appears

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(9) Hunt's Edition of Madison's Journal of Debates in the Constitutional Convention of 1787, vol. I, p. 16; Farrand's Records of the Federal Convention, vol. I, p. 21.

(10) Hunt, vol. I, p. 142; Farrand, Ibid., p. 245.

(11) Hunt, vol. I, pp. 47-8; Farrand, vol. I, p. 54.

(12) Hunt, vol. I, p. 102; Farrand, vol. I, pp. 164-5.

from the following extract from a letter dated October 24, 1787, written after its adjournment to his friend Jefferson:

"A *voluntary* observance of the Federal law by all the members could never be hoped for. A *compulsive* one could evidently never be reduced to practice, and if it could, involved equal calamities to the innocent & the guilty, the necessity of a military force both obnoxious & dangerous, and in general a scene resembling much more a civil war than the administration of a regular Government.

"Hence was embraced the alternative of a Government which instead of operating, on the States, should operate without their intervention on the individuals composing them; and hence the change in the principle and proportion of representation." [13]

So much for the Father of the Constitution. Next as to its classic expounder. In introducing on June 18th his plan of a national and highly centralized form of government, Alexander Hamilton enumerated "the great and essential principles necessary for the support of Government." Among these "great and essential principles" he mentioned force, of which he said:[14]

"*Force* by which may be understood a *coertion of laws* or *coertion of arms.* Congs. have not the former except in few cases. In particular States, this coercion is nearly sufficient; tho' he held it in most cases, not entirely so. A certain portion of military force is absolutely necessary in large communities. Massts. is now feeling this necessity & making provision for it. But how can this force be exerted on the States collectively. It is impossible. It amounts to a war between the parties. Foreign powers also will not be idle spectators. They will interpose, the confusion will increase, and a dissolution of the Union ensue." [15]

Hamilton, as in the case of Madison, clung to the views which he had expressed in Convention, and expressed them with peculiar and convincing force in the Federalist, written to justify the Constitution, which is, as is well known, the joint product of the minds and hands of Hamilton, Madison and Jay. In the following passage from the Federalist, Hamilton thus pays his respects to force:

"Whoever considers the populousness and strength of several of these States singly at the present juncture, and looks forward to what they will become, even at the distance of half a century, will at once dismiss as idle and visionary any scheme which aims at regulating their movements by laws to operate upon them in their collective capacities, and to be executed by a coercion applicable to them in the same capacities. A project of this kind is little less romantic than the monster-taming spirit which is attributed to the fabulous heroes and demi-gods of antiquity.

"Even in those confederacies which have been composed of members smaller than many of our counties, the principle of legislation for sovereign States, supported by military coercion, has never been found effectual. It has rarely been attempted to be employed but against the weaker members; and in most instances attempts to coerce the refractory and disobedient have been the signals of bloody wars, in which one half of the confederacy has displayed its banners against the other half." [16]

And on a third occasion, when converting to the proposed Constitution a hostile majority of the New York Convention by force of argument, not by force of arms, Hamilton restated his views on this interesting subject. In the first place, he declared it impossible to coerce States. Thus:

"If you make requisitions, and they are not complied with, what is to be done? It has been observed, to coerce the States is one of the maddest projects that was ever devised. A failure of compliance will never be confined to a single State. This being the case, can we suppose it wise to hazard a civil war?" [17]

In the next place, he expressed the opinion that the States themselves would not agree to coerce others. Thus:

"But can we believe that one State will ever suffer itself to be used as an instrument of coercion? The thing is a dream. It is impossible." [18]

To the same effect is the language of George Mason, the bitterest opponent of the Constitution, as Messrs. Madison and Hamilton were its strongest advocates. On the matter of force, the opponents and the advocate agreed. Thus, Mr. Mason said on June 20th:

"It was acknowledged by Mr. Patterson that his plan could not be enforced without military coercion. Does he consider the force of this concession. The most jarring elements of nature; fire & water themselves are not more incompatible that [than] such a mixture of civil liberty and military execution. Will the militia march from one State to another, in order to collect the arrears of taxes from the delinquent members of the Republic? Will they maintain an army for this purpose? Will not the citizens of the invaded State assist one another till they rise as one Man, and shake off the Union altogether.

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(13) Hunt's Writings of James Madison, vol. V, p. 19; Farrand, vol. III, pp. 131-2.

(14) There is no doubt that Madison accurately reported Hamilton's views and language, for as Mr. Hunt says in a note to his edition of Madison's Journal: "Hamilton happened to call upon Madison while the latter was putting the last touches to this speech and 'acknowledged its fidelity, without suggesting more than a few verbal alterations, which were made' (Cf. *Madison's Writings*, vol. II)"; Hunt, vol. I, note 1, p. 152.

In the notes for his speech (I Farrand, p. 306), are the following headings under section V:

Force of two kinds:
Coertion of laws; *coertion* of arms.
First does *not exist*, and the last *useless*.
Attempt to *use it* a war between the States.
Foreign aid.

Madison's account of Hamilton's speech on the question of coercion is also borne out by the notes of Rufus King, like Madison and Hamilton, a member of the Convention. Under the caption "Force," Mr. King makes Hamilton say:

"The Force of law or the strength of Arms—the former is inefficient unless the people have the habits of obedience—in this case you must have Arms—if this doctrine is applied to States—the system is Utopian—you could not coerce Virginia." (I Farrand, p. 302.)

(15) Hunt's Edition of Madison's Journal, vol. I, pp. 154-5; Farrand's Records of the Federal Convention, vol. I, pp. 284-5.

(16) The Federalist, Ford's Edition, 1898, pp. 99-100.

(17) Elliot's Debates in the State Conventions on the Adoption of the Federal Constitution, vol. II, pp. 232-3.

(18) Ibid, p. 233.

Rebellion is the only case in which the military force of the State can be properly exerted agst. its Citizens." [19]

Finally, lest the views of the statesmen of the Revolution, the founders of the Republic, and the framers of the Constitution, become wearisome, I make but one further quotation. In advocating the ratification of the Constitution by the Connecticut Convention, Oliver Ellsworth, with that fine poise and balance of mind characteristic of the Senator and of the Chief Justice of the Supreme Court of the United States, pointed out that nothing would prevent the States from falling out if they so desired, saying on this point:

"If the United States and the individual States will quarrel, if they want to fight, they may do it, and no frame of government can possibly prevent it." [20]

In advocating the need of a coercive principle, he said:

"We all see and feel this necessity. The only question is, Shall it be a coercion of law, or a coercion of arms? There is no other possible alternative. Where will those who oppose a coercion of law come out? Where will they end? A necessary consequence of their principles is a war of the States one against the other. I am for coercion by law—that coercion which acts only upon delinquent individuals. This Constitution does not attempt to coerce sovereign bodies, States, in their political capacity. No coercion is applicable to such bodies, but that of an armed force. If we should attempt to execute the laws of the Union by sending an armed force against a delinquent State, it would involve the good and bad, the innocent and guilty, in the same calamity."

In these various extracts it is to be observed that the issue is drawn by our ancestors between the coercion of law and the coercion of armed force, and today, as then, the issue is still between law and armed force. They chose, and wisely, a Supreme Court, in which law should be administered, and they left the appearance of the defendant State and the execution of the judgment to an enlightened and irresistible public opinion, or, as they expressed it in the Declaration of Independence, to "a decent respect to the opinions of mankind."

Nothing truer has ever been said than Oliver Ellsworth's simple observation, confirmed by the experience of independent or federated States of the Old as well as of the New World, that if they want to quarrel and if they want to fight "they may do it, and no form of government," and may I add no form of treaty creating a league, alliance or coalition "can possibly prevent it." A wise and far-seeing statesman of our own day, fit company for Ellsworth and his associates, has stated this simple truth in a more elaborate and analytical form.

"There are," as Secretary of State Root said in laying the corner-stone of the building for the International Union of the American Republics, "no international controversies so serious that they cannot be settled peaceably if both parties really desire peaceable settlement, while there are few causes of dispute so trifling that they cannot be made the occasion of war if either party really desires war. The matters in dispute between nations are nothing; the spirit which deals with them is everything." [21]

We must endeavor to put the new spirit into the old institutions, even although in so doing the new wine may destroy some of the bottles. We must rear our international structure upon the good faith of nations, for, if they do not keep the given word, treaties and conventions are but worthless things. We must offer every inducement to good faith and, as an indication of good faith on our part, we should not ask nations to enter into treaties which we ourselves may not keep and which we should know cannot be kept by them; because the failure to observe a solemn compact not only questions the good faith of the contracting parties at the moment of undertaking the obligation, but weakens the force even of those treaties which we can reasonably expect to be observed. We should not in this matter take counsel of despair and refuse to enter into treaties, but of experience, and knowing the temper of sovereign States, seek only at any given time to conclude agreements which past experience leads us to believe will be observed, and we must seriously set about the delicate, difficult, and time-consuming task of transferring the standard of conduct from individuals to States, in order that agreements which today seem to be impossible may on some distant morrow become possible of observance. We must remember, as President Roosevelt has, both in and out of office, repeatedly pointed out, that there is not and that there cannot be a difference between public and private morality, and just as he bent the corporation to the standard of conduct of the individual, so must we manfully endeavor to create an irresistible public opinion, which will compel the conduct of nations to square with their professions and to test both by the standard of conduct of the individual. As a step to this goal, which we should always have in view, I would suggest that we conclude treaties of a novel or far-reaching kind for a short period—five years, for example—in order that, as the result of experience, nations can refuse to continue an obligation which they find burdensome or unacceptable, without sacrificing the foundation of good faith upon which all must in the end depend. In the light of experience nations can then determine whether it is consistent with their interests, of which they must be the judges, that the treaty be continued or that it be discontinued. We should not, however, refuse to contract because sometimes good faith is not kept, but growing wiser by the experience of the past, not to speak of the present day, we should be more solicitous in the future to conclude only agreements which experience has shown or shows can be and which therefore will be observed.

We must act as men of affairs in basing our actions upon the probable, not upon the possible, for a public opinion can rarely be created for the latter, and it can only be developed for the former as the result of much wisdom, prudence, and well-directed effort.

The action of the Senate, in the exercise of its con-

(19) Hunt, vol. I, pp. 194-5; Farrand, vol. I, pp. 339-340. Madison's account of Mr. Mason's views on coercing a State is confirmed by the following note of Rufus King:

"The Genl. from N. Jersey proposed a military force to carry Requisitions into Execution. This never can be accomplished. You can no more unite opposite Elements, than you can mingle Fire with Water—military coercion wd. punish the innocent with the guilty; therefore unjust" (Farrand, vol. I, p. 349).

(20) Elliot's Debates, vol. II, pp. 196-7; Farrand's Records of the Federal Convention, vol. III, p. 241.

(21) American Journal of International Law, Vol. 2, p. 624 (1908).

stitutional treaty-making power, upon the treaties of 1911 between the United States on the one hand, and France and Great Britain on the other, providing for unlimited arbitration, is an example of an unsuccessful attempt to commit the government to a course of conduct which lacked the support of public opinion and in behalf of which course of conduct public opinion could not be created.

If States claiming to be sovereign spurned coercion, nations actually sovereign are not likely to accept coercion. Personally I prefer the Supreme Court of the Fathers of the Constitution, with all its imperfections, to the project of Penn armed with force from head to foot, and I believe that the statesmen of the future, like the statesmen of the past, will prefer to proceed from the known to the unknown just as the patriots of the Revolution proceeded from the Privy Council of the Colonies to the Supreme Court of the States.

May we not, on the eve of an International Conference, say with Washington on the eve of the International Conference of 1787: "Let us raise a standard to which the wise and the honest can repair. The event is in the hands of God."

We should not forget in our eagerness to have justice as administered by the Supreme Court enter into and control the practice of nations, that the principle with which we are so familiar is unknown in other countries where courts of justice pass only upon suits between private suitors, and do not pass upon the sovereign powers of States. We must not ask too much at once. We should rather endeavor to inform public opinion in foreign countries and to enlist it in behalf of the judicial settlement of disputes between States. We ourselves should not interpose requirements of a kind to delay the acceptance of the principle which we advocate and the practice for which we contend. This has never been more clearly pointed out than by Mr. Root in the following passage:

"I assume that you are going to urge that disputes between nations shall be settled by judges acting under the judicial sense of honorable obligation, with a judicial idea of impartiality, rather than by diplomats acting under the diplomatic ideas of honorable obligation and feeling bound to negotiate a settlement rather than to pass without fear or favor upon questions of fact and law.

"It seems to me that such a change in the fundamental idea of what an arbitration should be is essential to any very great further extension of the idea of arbitration. I have been much surprised, however, to see how many people there are of ability and force who do not agree with this idea at all, particularly people on the other side of the Atlantic. The extraordinary scope of judicial power in this country has accustomed us to see the operations of government and questions arising between sovereign States submitted to judges who apply the test of conformity to established principles and rules of conduct embodied in our constitutions.

"It seems natural and proper to us that the conduct of government affecting substantial rights, and not depending upon questions of policy, should be passed upon by the courts when occasion arises. It is easy, therefore, for Americans to grasp the idea that the same method of settlement should be applied to questions growing out of the conduct of nations and not involving questions of policy.

"In countries, however, where the courts exercise no such power, the idea is quite a new one to most people, and, if it is to prevail, there must be a process of education." [22]

X.

To endeavor to create an enlightened public opinion in behalf of peaceable settlement in general, and in particular in behalf of the foregoing nine propositions, in order that, if agreed to, they may be put into practice and become effective, in response to the appeal to that greatest of sanctions, "a decent respect to the opinions of mankind."

If for physical force we would substitute justice, we must create a public opinion in favor of justice, as we must create a public opinion in behalf of any and every reform which we hope to see triumph. The more difficult the problem, the greater the need that we set about it, and the sooner we begin the better it will be for the cause which we champion. There are many who advocate short-cuts to international justice, and therefore to international peace, just as there are many who advocate short-cuts to knowledge; but the pithy reply of Pythagoras to his royal but backward pupil is as true today as it was when uttered centuries ago, that there is no royal road to learning. To change the standard of conduct, and as a preliminary to this to change the standard of thought, is indeed a difficult task; but if mankind is to prefer the test of justice to the test of force, we must educate mankind to a belief in justice. If we succeed, justice will prevail between nations as between men; if we fail, justice may partially prevail between men, as it largely does today, but not between and among the nations. The problem before us is therefore one of education from a false to a true and an ennobling standard. If public opinion can be educated in one country, as for instance, in the United States, it can be educated in other countries, and we can confidently look forward to a public opinion in all countries—universal, international, and as insistent as it is universal and international. A mere statute, we know by a sad experience, will not make men virtuous, and a mere treaty—for a treaty is an international statute—will not make the nations virtuous. We have failed in the one, and we are doomed to failure in the other attempt, for nations, composed of these very men and women, are not to be reformed by statute any more than the men and women composing them. Without public opinion the statute—national or international—is a dead letter; with public opinion the statute—national or international—is a living force. With public opinion all things are possible; without public opinion we may hope to do nothing. Were Archimedes living today, and if he were speaking of things international, he would declare public opinion the lever that moves the world.

In speaking of public opinion, Mr. Root, whom I have so often quoted, has said:

"There is but one power on earth that can preserve the law for the protection of the poor, the weak, and the humble: there is but one power on earth that can pre-

(22) Root's "Addresses on International Subjects," pp. 151-2.

serve the law for the maintenance of civilization and humanity, and that is the power, the mighty power, of the public opinion of mankind.

"Without it your leagues to enforce peace, your societies for a world's court, your peace conventions, your peace endowments are all powerless, because no force moves in this world until it ultimately has a public opinion behind it.

"The thing that men fear more than they do the sheriff or the policeman or the State's prison is the condemnation of the community in which they live.

"The thing that among nations is the most potent force is the universal condemnation of mankind. And even during this terrible struggle we have seen the nations appealing from day to day, appealing by speech and by pen and by press, for the favorable judgment of mankind, the public opinion of the world. That establishes standards of conduct."

Conclusion.

I have endeavored briefly to lay before you a constructive program upon which we may concentrate our efforts, in the hope that we may produce some effect upon public opinion, which is today the master of us all. I have confined myself to plans with which you are familiar, and which are familiar to all those interested in international peace. In outlining these measures I have not gone into detail, but have contented myself with a statement of the general principles, in the belief that, if we can catch the eye or the ear of authority, we can safely trust to the wit and wisdom of nations to take the steps necessary to put the project, based upon the general principles, into effect. And we have, in my opinion, a better chance of reaching responsible leaders of thought if we stop with the general principles upon which we can all agree, leaving to them the task, or rather, I should say, the privilege, of working out the details.

But I have said enough on these matters, and I have already trespassed too long upon your indulgence. Let me hold you, however, yet a little while, that I may return to the Hague Conferences with which I started. I am the more inclined further to trespass upon your time, as it is in the interest of a great cause, and because the words which I wish to lay before you are not mine, although I would make them mine if I could by quoting them.

In submitting the Hague Conventions and Declarations of 1907 to the Senate, Mr. Root, then Secretary of State, said:

"The most valuable result of the Conference of 1899 was that it made the work of the Conference of 1907 possible. The achievements of the Conferences justify the belief that the world has entered upon an orderly process through which, step by step, in successive Conferences, each taking the work of its predecessor as its point of departure, there may be continual progress toward making the practice of civilized nations conform to their peaceful professions." [23]

And, still further developing the same thought, the same great statesman said, in an introduction to a collection of the texts of the Peace Conferences at The Hague:

"The question about each international conference is not merely what it has accomplished, but also what it has begun, and what it has moved forward. Not only the conventions signed and ratified, but the steps taken toward conclusions which may not reach practical and effective form for many years to come, are of value. Some of the resolutions adopted by the last conference do not seem to amount to very much by themselves, but each one marks on some line of progress the farthest point to which the world is yet willing to go. They are like cable ends buoyed in mid-ocean, to be picked up hereafter by some other steamer, spliced, and continued to shore. The greater the reform proposed, the longer must be the process required to bring many nations differing widely in their laws, customs, traditions, interests, prejudices, into agreement. Each necessary step in the process is as useful as the final act which crowns the work and is received with public celebration." [24]

And, finally, in the following passages, pronounced by the most distinguished of international lawyers to be wisdom incarnate (*la sagesse elle-même*), Mr. Root said in his instructions to the American delegation to the second conference:

"1. In the discussions upon every question it is important to remember that the object of the Conference is agreement, and not compulsion. If such Conferences are to be made occasions for trying to force nations into positions which they consider against their interests, the Powers can not be expected to send representatives to them. It is important also that the agreements reached shall be genuine and not reluctant. Otherwise they will inevitably fail to receive approval when submitted for the ratification of the Powers represented. Comparison of views and frank and considerate explanation and discussion may frequently resolve doubts, obviate difficulties, and lead to real agreement upon matters which at the outset have appeared insurmountable. It is not wise, however, to carry this process to the point of irritation. After reasonable discussion, if no agreement is reached, it is better to lay the subject aside, or refer it to some future Conference in the hope that intermediate consideration may dispose of the objections. Upon some questions where an agreement by only a part of the Powers represented would in itself be useful, such an agreement may be made, but it should always be with the most unreserved recognition that the other Powers withhold their concurrence with equal propriety and right.

"The immediate results of such a conference must always be limited to a small part of the field which the more sanguine have hoped to see covered; but each successive Conference will make the positions reached in the preceding Conference its point of departure, and will bring to the consideration of further advances toward international agreements opinions affected by the acceptance and application of the previous agreements. Each Conference will inevitably make further progress and, by successive steps, results may be accomplished which have formerly appeared impossible.

"You should keep always in mind the promotion of this continuous process through which the progressive development of international justice and peace may be

(23) Senate Document No. 444, 60th Congress, 1st session. p. 63.

(24) Scott's Texts of the Peace Conferences at the Hague, p. iv.

carried on; and you should regard the work of the Second Conference, not merely with reference to the definite results to be reached in that Conference, but also with reference to the foundations which may be laid for further results in future Conferences. It may well be that among the most valuable services rendered to civilization by this Second Conference will be found the progress made in matters upon which the delegates reach no definite agreement." [25]

The irreducible minimum may well be the maximum of achievement at any given time, and in all our meetings, and in all our discussions, we should bear in mind the wise counsel of a great French statesman at the First and Second Hague Peace Conferences that:

"We are here to unite, not to divide."

INTERNATIONAL REORGANIZATION.

By ALPHEUS H. SNOW

On May 18, 1899, twenty-six nations assembled by their delegates at The Hague. The assembly adjourned on July 29, the delegates having theretofore agreed upon, and on that day signed, subject to ratification, a document which was called The Convention for the Pacific Settlement of International Disputes. On September 4, 1900, seventeen of the nations represented at The Hague Conference—two-thirds of the whole number—ratified this Convention and put it into effect as to themselves.

Between September 4, 1900, and June 15, 1907—the day of the opening of the second Hague Conference—the remaining nine of the nations which had participated in the first Conference ratified the Convention. On June 15, 1907, fourteen nations which had not participated in the first Conference adhered to the Convention. While the second Hague Conference was in session, between June 15 and October 18, 1907, three more nations adhered to the Convention. On July 3, 1907, when the last nation adhered to it, all except two of the nations of the world invited to the Conference had accepted the Convention,—these two being Costa Rica and Honduras. The Convention for the Pacific Settlement of International Disputes, in the form in which it was adopted in 1899, by the first Hague Conference, thus became, in July, 1907, the practically unanimous act of all the nations of the world.

This Convention was amended and revised by the second Conference, but the amended and revised Convention (Art. 91) provided that "the present Convention, duly ratified, shall replace, as between the contracting powers, the Convention for the Pacific Settlement of International Disputes of the 29th July, 1899." The reasonable interpretation of this, considering the practice observed by the nations with regard to the original Convention, is, that the amended and revised Convention was not intended to go into effect until it had been ratified by two-thirds of the forty-six nations represented at the second Hague Conference. As a matter of fact, the amended and revised Convention has not been ratified by even a majority of these nations, and as more than nine years have elapsed since it was formulated—seven of peace and two of war—it seems unlikely that a two-thirds ratification can ever be obtained. As the amended and revised Convention was only to be a substitute for the original Convention, when "duly ratified," and as it has never been "duly ratified," if the above interpretation is correct, it necessarily follows that the original Convention of 1899 is still in full force and effect, and that the next conference or assembly of the nations will have before it solely the Convention for Pacific Settlement of 1899, the unanimous act of the nations. In that case the conference will, of course, treat the amended and revised Convention for Pacific Settlement of 1907, and all other action of the second Hague Conference bearing upon the pacific settlement of international disputes, as void; but it will, no doubt, regard all this action as subject to its consideration in priority to all other matters. On such consideration, the Convention establishing the Court of Arbitral Justice would no doubt promptly be enacted, and all other action of the Second Hague Conference relating to judicial action of a wholly voluntary nature would doubtless promptly be re-enacted—in both cases, however, with amendments.

This Convention for Pacific Settlement is a document of the most profound significance. It is not a mere treaty; it is a constitution of a body politic and corporate composed of all the nations of the world. Prior to July 29, 1899, the nations of the world formed a mere unorganized community. On that day, by the signing of the Convention for Pacific Settlement by the authorized delegates of twenty-six nations, a written constitution was formulated for converting this unorganized community into an organized body corporate and politic. On September 4, 1900, when the Convention went into effect as to seventeen nations, these seventeen nations became a body politic and corporate under a written constitution. On July 3, 1907, when it went into effect as to substantially all the nations of the world, the nations of the world became a body politic and corporate under a written constitution.

The Convention was a constitution, because it dealt with the permanent and enduring relationships of the nations—"international disputes" covering every kind of relationship, present and future; because it defined the permanent and enduring processes by which these relationships were to be determined—conciliation and arbitration; and because it instituted definite organs for the permanent carrying on of one of these processes—the Permanent Court of Arbitration, the Permanent Administrative Council, and the International Bureau. The processes thus defined and the organs thus instituted were not merely joint processes and joint organs of the nations as several and distinct entities. They were processes and organs of a new political and corporate unity above the nations. The object of the constitution, in legal contemplation, was to create a super-unity which should formulate and wield the collective moral influence of all nations, and which should be wholly without compulsive power of any kind. The super-unity thus formed was thus not a super-state, but a consociation[1]—a mutual benefit society or an academic

([25]) Foreign Relations, 1907, pt. 2, pp. 1129-1130; Instructions to the American Delegates, pp. 71-72.

([1]) That the nations assembled at the Hague Conferences organized themselves into a body politic and corporate of a wholly voluntary nature was first clearly pointed out by Professor Walther Schücking, of the University of Marburg,